United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: May 23, 2005

TO : Cornele A. Overstreet, Regional Director
Region 28

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Koeller, Nebeker, Carlson & Haluck, LLP
Case 28-CA-19995

536-2505-0000-0000
512-5012-0000-0000
506-0170-0000-0000
506-2017-0000-0000
506-2001-5000-0000

The Region submitted this case for advice on whether to proceed with its complaint alleging that the Employer violated Section 8(a)(1) by terminating an employee in retaliation for reporting alleged sexual harassment by a fellow employee. The Region postponed the hearing indefinitely in light of an ALJ's decision in Charles Schwab & Co., Inc.,[1] applying the Board's recent decision in Holling Press, Inc.,[2] both of which dismissed similar allegations on the basis that the charging parties' respective activities in relation to their sexual harassment complaints were not for the "mutual aid and protection" of others. The Region also sought advice on whether the Employer violated Section 8(a)(1) by promulgating and enforcing an overly broad no-communication rule and interrogating the Charging Party about her protected concerted activities.

We conclude that this case is distinguishable from Holling Press and Schwab because the Charging Party's harassment complaint was undertaken for the mutual aid and protection of others and thus, was protected concerted activity under Section 7. We also conclude that the Employer's no-communication rule and interrogation violated Section 8(a)(1). Accordingly, the Region should proceed on the complaint as issued, absent settlement.

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[1] JD(SF)-79-04, Case 28-CA-19445 (December 16, 2004). No party filed exceptions in Schwab, and the Board affirmed the matter on February 8, 2005.

[2] 343 NLRB No. 45 (October 15, 2004).

FACTS

Koeller, Nebeker, Carlson & Haluck, LLP (the Employer or the firm) is a general practice law firm which employs about fifty attorneys and has offices located in Southern California, Nevada, and Arizona. In February 2002, the Charging Party was hired as an associate attorney and worked under the supervision of the Managing Partner and Supervising Partner in the firm's Phoenix, Arizona office.[3]

In July 2004,[4] the firm hired a male attorney with twenty years of experience (Senior Attorney) who had previously worked with both the Managing Partner and the Supervising Partner in prior cases. According to rumors among the attorneys the Senior Attorney would be promoted to partner and human resources administrator within the next year.

I. August 5 Sculpture Incident

On August 5, the Senior Attorney came into the Charging Party's office, where she was discussing a case with a legal assistant. While smiling and apparently joking, he told the Charging Party that he had turned her in for sexual harassment. The Charging Party asked the Senior Attorney what he was talking about. He said that the Charging Party had made a comment about his "ass" the previous day. The legal assistant interjected and told the Senior Attorney that he was mistaken, and that it was not the Charging Party who had made the comment, but another female associate with whom he had a previous discussion that also involved the legal assistant. The Charging Party again asked what the Senior Attorney was talking about, to which he replied that he was joking. He then explained that he had once polled a jury after a trial to see what they liked or disliked about his presentation. Apparently, a couple of the jurors replied that he should wear different pants because his pants were too loose fitting and made his "ass" look large. After this explanation, the Senior Attorney then asked the Charging Party and legal assistant if they wanted to see his "octopus." The Charging Party and the legal assistant went with him to his office where he showed them a sculpture of a nude woman's torso, and announced that it was a woman's

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[3] The Employer has asserted that the Charging Party is a supervisor under Section 2(11) of the Act. The Region has concluded that the facts do not support the Employer's contention and this issue was not submitted for advice and is not addressed in this memorandum.

[4] All dates hereinafter occurred in 2004, unless noted otherwise.

breasts. The Charging Party asked the Senior Attorney if he thought the sculpture was appropriate for the office. The Senior Attorney responded by stating that his wife had made the sculpture for him and would "kill" him if he did not display it. The Charging Party then left the office.

On separate dates soon after August 5, the Charging Party discussed the sculpture incident with a female associate, a male associate, and another legal assistant. After the Charging Party told the female associate that the sculpture made her uncomfortable, the female associate remarked that she had seen the sculpture and discussed it with other employees. During her discussion with the male associate about the incident, he told her that all of the women in the office would hate the Senior Attorney by the end of the year because he was very chauvinistic and had said that a woman's role was "barefoot and in the kitchen." The legal assistant stated that the Senior Attorney's behavior was strange and that people were talking about him around the office.

II. Events of September 10

On September 10, the Charging Party went to lunch with two male associates. During lunch, she told them about the sculpture incident. She also discussed other instances of the Senior Attorney's perceived inappropriate conduct, including what other people in the office were saying about him. With regard to the sculpture incident, the associates both said that it did not "sound right" and encouraged her to "document" her concerns with the HR Manager.

After lunch, the Charging Party went to the HR Manager's office and reported the sculpture incident. She also told the HR Manager that other people in the office were discussing the Senior Attorney and his behavior. She further told the HR Manager that other employees had told her to report the incidents and that she did not want action taken against the Senior Attorney but wanted the incidents documented in case other employees had similar issues with the Senior Attorney in order to establish a pattern. The HR Manager asked the Charging Party to follow up with a written complaint. After the meeting, the Charging Party returned to her office and sent the HR Manager an electronic message documenting the incidents of August 5 and their discussion.

III. Events of September 14

The morning of September 14, the Senior Attorney came to the Charging Party's office to discuss a work matter. After entering, he attempted to shut the door behind him. The Charging Party began to shake and yelled at him not to shut the door because she did not "like him" and did not "trust him." The protests were loud enough to be heard by those in adjacent offices and the hallway, including the HR Manager. The Senior Attorney left the Charging Party's office and went to the HR Manager's office and asked to speak to management and complained that he felt the firm had an "internal problem" with the Charging Party and that he could not work in such an environment.

Soon after the incident, the Managing Partner approached the Charging Party and asked her what had happened. She told him that the Senior Attorney gave her the "creeps" and was "weird." The Managing Partner asked her if her complaint against the Senior Attorney was sexual in nature.[5] The Charging Party responded no, but requested that she not be required to work with the Senior Attorney on any other cases.

That afternoon, the Managing Partner told the HR Manager about his discussion with the Charging Party that morning. The HR Manager told the Managing Partner for the first time about the Charging Party's September 10 complaint. The Managing Partner then asked the HR Manager to review the Charging Party's personnel file and work history and to prepare a memorandum identifying the staff members who had complained about her. In response to this request, the HR Manager prepared a memorandum captioned "Recommendation: Employment Termination." The memorandum listed complaints made by various employees, including two complaints made by the Senior Attorney against the Charging Party. One of the two complaints involved the yelling incident on September 14. The other complaint was made in August when the Senior Attorney alleged that the Charging Party had been "rude and unprofessional" toward him when he had requested information regarding a case file.

The HR Manager also sent an electronic message to the Managing Partner with the Charging Party's September 10 electronic message attached; she wrote:

> This is the email that [the Charging Party] sent me last Friday. She told me to just file it and that another employee told her that this would be

[5] At this time, the Managing Partner did not know about the Charging Party's September 10 complaint.

> a good idea, just in case there is a pattern with [the Senior Attorney]. [The Charging Party] told me that she did not want any action taken since this was not a complaint. She simply wanted me to have it in case any other issues with another employee came up.

Late that afternoon, the Supervising Partner called the Charging Party into his office where the HR Manager was also present. The Supervising Partner asked the Charging Party about the yelling incident that morning with the Senior Attorney. He asked her why she felt uncomfortable with the Senior Attorney and she responded that he "flirts with me in a gross way and creeps me out." The Supervising Partner then asked if the incident was related in any way to the sculpture and told the Charging Party that he had been provided with a copy of her September 10 complaint. The Charging Party replied with words to the effect that her reaction had something to do with the sculpture and the sculpture incident; that the sculpture is clearly a woman's breasts; and that the Senior Attorney's behavior was in general, "weird, unprofessional, and inappropriate." The Supervising Partner asked her if her September 10 complaint was a sexual harassment complaint. The Charging Party replied that it was not and that she had documented the incident with the HR Manager "in case there was a pattern with [the Senior Attorney] and women." The Supervising Partner continued questioning the Charging Party about other matters, such as her relationship with and her opinion of her secretary. He also asked her whether she had an issue with people's attire in the office.[6] The meeting lasted approximately forty-five minutes.

After the meeting, the Supervising Partner called into his office one of the two associates who had lunch with the Charging Party the day she filed her September 10 complaint. He discussed his recent meeting with the Charging Party and expressed dissatisfaction when the associate admitted that he had encouraged the Charging Party to document the incidents with the Senior Attorney. The associate left the Supervising Partner's office when the Senior Attorney knocked on the office door. When the Charging Party was leaving work later that evening, she saw the Supervising Partner leave the parking garage in the Senior Attorney's car.

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[6] In an attorney meeting a couple years prior, the Charging Party had suggested that an attorney was not dressing in accordance with the firm's dress code standards. Other attorneys at the meeting agreed.

IV. Events of September 15

On the morning of September 15, the Charging Party forwarded her September 10 email to the Managing Partner. In the electronic message, she stated, in relevant part:

> I am sure that you have seen this e-mail, but I wanted to make sure that I provided you with a copy. [The Supervising Partner] told me yesterday that the employee handbook requires all sexual harassment be reported to him or you if I feel uncomfortable reporting it to him. These events constitute clear sexual harassment and I am now reporting it. I did not report the incident right away because I felt extremely uncomfortable with the events and did not know what to do. However, after talking with a few people, they encouraged me to report it because they believed it was sexual harassment.

She further requested in the electronic message that the Supervising Partner be removed from the matter due to his "close friendship" with the Senior Attorney.

Moments after the electronic message was sent, the Managing Partner and HR Manager went to the Charging Party's office. The Managing Partner proceeded to question the Charging Party, covering the same subjects discussed in her meeting with the Supervising Partner the previous afternoon. The Managing Partner said he needed to conduct an investigation and told the Charging Party that he did not want her to "discuss the incident or the investigation with anyone."

A couple of hours later, the Charging Party learned from an associate she had lunch with on September 10 that the Supervising Partner had spoken with him the night before and was upset with him for encouraging the Charging Party to document her complaints against the Senior Attorney. Having witnessed the Supervising Partner and Senior Attorney leave together the previous evening and after hearing about this new development, the Charging Party sent the Managing Partner an electronic message expressing concerns about the Supervising Partner's involvement and indiscretion with the matter, and stating she did not want the Supervising Partner to speak to others about the matter, except for other partners, if necessary.

About forty-five minutes after sending the electronic message, the Charging Party sent another electronic message

to the Managing Partner and the HR Manager advising them that she was not feeling well and was leaving for the day.

V. Events of September 16

The next morning, on September 16, the Managing Partner and the HR Manager again met with the Charging Party to discuss her sexual harassment claim. During the meeting, the Managing Partner asked her, "How did it come about that [the associate] told you he spoke with [the Supervising Partner]?" The Charging Party told him that the associate had told her the day before when she happened to be near his office looking for another employee. The Managing Partner, accompanied by the HR Manager, then spent the rest of the morning interviewing witnesses about the Charging Party's sexual harassment complaint.

Later that afternoon, the Managing Partner and the HR Manager went to the Charging Party's office and told her she was terminated. The Managing Partner stated that she was being discharged because she could not "get along with other people."

VI. Employer's Position

The Employer claims that the Charging Party was not engaged in protected concerted activity when she reported the Senior Attorney's behavior and further, that even if she was, it discharged the Charging Party because of her "rudeness to staff, offensiveness to other counsel, and inability to properly work a file" and not because of her complaints of sexual harassment.[7] The Employer states in one of its position statements that, "[The Charging Party] told [the HR Manager] that the only reason she was providing this piece of information was in case anyone else had a complaint against [the Senior Attorney] her memo might establish a pattern of misconduct." The Employer denies that the Managing Partner ever instructed the Charging Party on September 15 not to discuss the investigation of her sexual harassment complaint with anyone, but even if such an instruction was made, it was to ensure confidentiality and compliance with EEOC and Board policies. The Employer cites the following EEOC guideline in support of its position, in relevant part:

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[7] The Employer did not provide Board affidavits, but submitted memoranda that were purportedly from some of the employees involved in the matter. The memoranda are internal memoranda and are not signed and presumably were not made under oath.

> An employer should make clear to employees that it will protect the confidentiality of harassment allegations to the extent possible. An employer cannot guarantee complete confidentiality, since it cannot conduct an effective investigation without revealing certain information to the alleged harasser and potential witnesses.

ACTION

We conclude that the Region should proceed on the Section 8(a)(1) discharge complaint as issued, absent settlement, because the Charging Party was engaged in protected concerted activity for the mutual aid or protection of fellow employees when she reported the Senior Attorney's conduct to the Employer. In that respect, this case is distinguishable from Holling Press and Schwab, where the charging parties appeared to be acting solely for their own benefit. We further conclude that the Employer violated Section 8(a)(1) by promulgating an overly broad and discriminatory no-communication rule and interrogating the Charging Party, because such conduct was directed at the Charging Party's protected concerted activities.

I. The Charging Party was Engaged in Protected Concerted Activity when She Reported a Fellow Employee's Conduct

We agree with the Region that the Charging Party's activity of reporting the Senior Attorney's conduct constituted Section 7 protected concerted activity. The Board's test for determining whether an individual's activity is protected under Section 7 is set forth in Meyers Industries, Inc.[8] Under Meyers, to establish Section 7 protection, an employee's activity must relate to a term or condition of employment and must be concerted, or "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself."[9] Once the activity is deemed to be concerted, a Section 8(a)(1) violation will be found if in addition the employer knew of the concerted nature of the employee's activity; the concerted activity was protected by the Act; and the adverse employment action at issue was motivated by the employee's protected concerted activity.[10] Under Meyers, to qualify as

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[8] 281 NLRB 882 (1986) (Meyers II), supplementing Meyers Industries, 268 NLRB 493 (1984) (Meyers I), remanded sub nom. Prill v. NLRB, 755 F.2d 941 (D.C. Cir. 1985), cert. denied 106 S.Ct. 313, 352 (1985).

[9] Meyers II, 281 NLRB at 885.

[10] Meyers I, 268 NLRB 493, 497.

Section 7 protected concerted activity, the employee's activity must be both "concerted" as well as "for mutual aid and protection."[11] In this case, the Charging Party was engaged in Section 7 protected concerted activity as defined under Meyers when she reported the Senior Attorney's conduct to the Employer because her activity was both "concerted" and engaged in for the "mutual aid and protection" of her fellow employees.

A. Charging Party's Activity was Concerted

Generally, activity that is engaged in with the "object of initiating or inducing or preparing for group action" may constitute concerted activity.[12] The Board will also consider whether the activity involved a common concern regarding conditions of employment and whether the issue was framed as a common concern to determine whether activity is concerted.[13] Here, the evidence demonstrates that by reporting the incidents the Charging Party sought to alert management of a workplace concern – that is, sexual harassment by a fellow employee – and to prepare for group action insofar as her complaint would establish a record "in case any other issues with another employee came up." Before filing her September 10 complaint, the Charging Party spoke with a number of employees. Significantly, at lunch with the Charging Party on September 10, the two associates expressed their concern that other employees were subjected to the sculpture and encouraged her to report the incident.

B. The Employer Knew of the Concerted Nature of the Charging Party's Activity

By its own admission, the Employer knew of the concerted nature of the Charging Party's activity as early as September 10, when the Charging Party reported the Senior

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[11] Meyers II, 281 NLRB at 885.

[12] Mushroom Transportation Co. v. NLRB, 330 F.2d 683, 685 (3d Cir. 1964).

[13] Wal-Mart Stores, Inc., 341 NLRB No. 111, slip op. at 9 (2004) ("an individual is acting on the authority of other employees where the evidence suggests a finding that concerns expressed by the individual employee are a logical outgrowth of the concerns expressed by the group") quoting Amelio's, 301 NLRB 182 n.4 (1991). See also NLRB v. City Disposal Systems, Inc., 465 U.S. 822, 831 (1984) (affirming the Board's power to protect certain individual activities and citing as an example "the lone employee" who "intends to induce group activity").

Attorney's behavior to the HR Manager. According to the HR Manager's September 14 electronic message to the Managing Partner, which also alerted him to the Charging Party's complaint and its context, the Charging Party told her when filing the complaint that: 1) another employee had told her that submitting the report of sexual harassment was a good idea; and 2) that she wanted the complaint on file "in case any other issue with another employee came up." Further, the Employer admitted in a position statement, that "...[the Charging Party] told [the HR Manager] the only reason she was providing this piece of information was in case anyone else had a complaint against [the Senior Attorney] her memo might establish a pattern of misconduct." These statements indicate the Employer knew and understood that the Charging Party's complaint represented a group concern.

C. The Charging Party's Activity was for Mutual Aid and Protection

The Charging Party's concerted activity was also for the purpose of "mutual aid and protection" of her fellow employees. The Charging Party filed the complaint on behalf of not only herself, but other employees who had expressed concerns to her about the sculpture and the Senior Attorney's conduct. In particular, soon after the August 5 sculpture incident, the Charging Party had discussions with a female associate who told her that she had talked to others about the sculpture; a male associate who told her that the Senior Attorney had made derogatory and chauvinistic comments about women; and a legal assistant who said the Senior Attorney's conduct was "strange." Significantly, the two male associates at the lunch on September 10 – the day she reported the incidents - stated that the incidents with the Senior Attorney did not "sound right" and encouraged her to document the incidents with the HR Manager. Also, when the Charging Party reported the incidents after the lunch, she alerted the HR Manager that this was a common concern shared by other employees, not just herself. As noted above, the Employer's electronic mail communications and position statements essentially admit that the Charging Party's complaint was made on behalf of other employees. Therefore, there is ample evidence that the Charging Party's concerns were shared by others, she was encouraged to report the incidents by others, and she framed the issue as a common concern when she reported the incidents.

In this respect, this case is unlike Holling Press and Schwab, supra, where the respective charging parties were unable to show that their actions were undertaken for the mutual benefit of others even though the actions were found to be concerted. In Holling Press, the Board found that

employee Fabozzi was not engaged in Section 7 activity when she solicited a coworker to be a witness in support of the sexual harassment claim that she had filed with a state agency against a fellow coworker.[14] Relying on Meyers, the Board concluded that while Fabozzi's appeal to other employees to aid her in her sexual harassment claim before the state agency constituted concerted conduct, the claim was "uniquely designed to advance her own cause" and "was not for mutual aid or protection."[15] The Board emphasized that employee conduct must be both concerted and engaged in for the purpose of mutual aid or protection in order to fall within the ambit of Section 7.[16] The Board found that Fabozzi's actions did not meet the "mutual aid and protection" element because: 1) her complaint was individual in nature; 2) her appeal to others was not made to accomplish a collective goal but rather to advance her own cause; and 3) there was no evidence that "...any other employee had similar problems - real or perceived - with a coworker or supervisor."[17] Thus, the Board concluded that Fabozzi's actions, although concerted, did not inure to the benefit of others and were therefore not protected.[18]

Similarly, in Schwab, the ALJ found that employee Johnson was not engaged in protected concerted activity when she made sexual harassment allegations against a fellow employee.[19] Relying on Holling Press, the ALJ found that although Johnson may have technically acted in concert when she conversed with a co-worker about her allegations or named other employees as potential witnesses, she did not do so for mutual aid or protection. "There is absolutely no indication that Johnson was in any way interested in ensuring that other employees be protected against sexual harassment at the workplace."[20] The ALJ further reasoned

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[14] 343 NLRB No. 45, slip op. at 1.

[15] Id.

[16] Id. slip op. at 2.

[17] Id. slip op. at 2-3.

[18] Id. slip op. at 2.

[19] JD(SF)-79-04, Case 28-CA-19445, supra, slip op. at 12-14. Before addressing the legal issue of whether Johnson's sexual harassment complaint constituted protected concerted activity, the ALJ completely discredited Johnson's testimony and found that she had also fabricated the alleged incidents of harassment in order to cover up her own performance issues. Id. slip op. at 10.

[20] Id. slip op. at 12.

that the allegations of sexual harassment were only of concern to Johnson and that no other employees were interested; the employees named by Johnson had all "uniformly either denied that [the alleged harasser] was involved in any inappropriate conduct, had not complained about the [alleged harasser], or denied any knowledge of such conduct"; and there was no evidence that any other employee had similar problems – real or perceived – with the alleged harasser.[21] Accordingly, the ALJ found that Johnson was not engaged in protected Section 7 activity and that the employer did not violate Section 8(a)(1) when it terminated her for making sexual harassment allegations against her coworker.

The nature of the Charging Party's complaint in the instant case is markedly different from those in both Holling Press and Schwab. In both those cases, there was no evidence that the complainants were acting on behalf of anyone else but themselves. In Holling Press, Fabozzi filed an individual complaint with a state agency and the Board found that her "purpose was to advance her own cause," not "to accomplish a collective goal" when she solicited fellow coworkers to act as witnesses in her state claim.[22] In Schwab, the ALJ concluded that Johnson first raised the sexual harassment claims while she was being counseled by a supervisor for her unprofessional conduct – as a way to divert attention from her and onto others.[23] The ALJ found no evidence that she had the support of her fellow coworkers before she first raised the allegations; rather her contacts with coworkers occurred because "she was interested only in protecting herself against a finding that she had made a merit less claim against the [alleged harasser]."[24] Here, as discussed above, the Charging Party engaged in discussions with fellow employees who shared similar concerns regarding the incidents and some even encouraged her to report the incidents to the Employer. When she reported the incidents, the Charging Party alerted management that it was a common concern shared by other employees, not just herself. Further, as discussed, the Employer by its own statements acknowledged that the Charging Party's complaint was made on behalf of others.

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[21] Id. slip op. at 13-14.

[22] 343 NLRB No. 45, supra, slip op. at 1.

[23] Id. at 10-11.

[24] Id. at slip op. at 12.

For these reasons, we conclude that neither Holling Press nor Schwab is controlling with regard to the instant case because the evidence here clearly demonstrates that the Charging Party did not act solely on her own behalf when she reported the Senior Attorney's conduct, but for the mutual aid and protection of her fellow employees.

As a final matter on the protected concerted issue, we note that the evidence is not as clear whether the Charging Party received direct authorization from her fellow employees to report the incidents on their behalf. However, even without clear evidence of direct authorization, that the Charging Party perceived that she was acting for the mutual benefit of others is sufficient to deem her actions protected.[25]

D. The Charging Party was Fired for her Protected Concerted Activity

The Employer has presented a Wright Line[26] defense claiming that, notwithstanding her alleged protected conduct, it would have discharged the Charging Party for poor conduct and performance. However, the Region has concluded, and we agree, that the Employer has failed to demonstrate it would have terminated the Charging Party even if she did not file her sexual harassment complaint against the Senior Attorney.

II. Remaining Section 8(a)(1) Violations

Having concluded that the Charging Party's actions of reporting the Senior Attorney's conduct constituted protected concerted activity under Section 7, we also conclude that the Employer violated Section 8(a)(1) by promulgating a no-communication rule on September 15 and interrogating the Charging Party on September 16.

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[25] See Holling Press, supra, 343 NLRB No. 45, slip op. at 3, citing Circle K Corp., 305 NLRB 932 (1991), rev. den., enfd. 989 F.2d 498 (6th Cir. 1993) (even though solicited employees did not support the charging party and subjectively thought that she was acting in bad faith, those subjective thoughts of the solicitees did not undermine the Section 7 nature of her activities). See also El Gran Combo, 284 NLRB 1115, 1117 (1987), enfd. 853 F.2d 996 (1st Cir. 1988) (employee who repeatedly, but unsuccessfully, attempted to elicit support from other employees was engaged in Section 7 activity).

[26] Wright Line, 251 NLRB 1083, 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981).

A. The Employer Promulgated and Enforced an Overly Broad No-Communication Rule on September 15

On September 15, the Managing Partner informed the Charging Party that he needed to conduct an investigation of her sexual harassment complaint and instructed her not to "discuss the incident or the investigation with anyone." We conclude that this statement violated Section 8(a)(1) because it was overly broad and could reasonably encompass and restrict protected Section 7 communications.

In general, an employer must demonstrate that a legitimate and substantial business justification exists for a rule, such as a no-communication rule, that adversely impacts employees' Section 7 rights.[27] Further, such a prohibition must not be overly broad and should be narrowly tailored and limited in time and scope.[28]

We reject the Employer's claim of a substantial business justification for its rule. The Employer's only justification for its confidentiality rule is that it was in compliance with EEOC guidelines. However, the Employer's reliance on the EEOC guidelines is misplaced because those guidelines are directed at employers to keep matters confidential so as to protect the victims of sexual harassment. They are not intended to silence the victims.

Further, the Employer's rule prohibiting the Charging Party from discussing the "incident or investigation with anyone" was neither narrowly tailored nor limited in time or scope.[29] The rule was not limited to the duration of the

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[27] See, e.g., Caesar's Palace, 336 NLRB 271, 272 (2001) (employer had substantial business justifications for promulgating no-communication rule during a drug investigation involving allegations of a management coverup that justified the intrusion on employees' Section 7 rights, including ensuring that witnesses were not put in danger, that evidence was not destroyed, and that testimony was not fabricated).

[28] See, e.g., Lockheed Martin Astronautics, 330 NLRB 422, 423 (2000) ("[w]e recognize that the [employer] has obligations under other statutes, including the ADA, that may in some circumstances justify the prohibition of certain kinds of speech and conduct...however, any such prohibitions must be narrowly tailored in order to avoid unnecessarily depriving employees of their Section 7 rights") (citation omitted).

[29] In contrast, the ALJ in Schwab, supra, found that the employer there had legitimate business justifications when

investigation or the subject matter. The instruction could be reasonably interpreted to prohibit an employee from discussing the Senior Attorney's harassing behavior at all, or even more broadly, discussing sexual harassment at the workplace in general. This rule could therefore impermissibly restrict employee discussion of a workplace condition, i.e. sexual harassment at the firm.[30] The rule is also not sufficiently limited in time as it could reasonably be interpreted to prohibit discussion of the investigation even beyond the end of the investigation. As such, the Employer's rule is overly broad and in violation of Section 8(a)(1).

B. The Employer Unlawfully Interrogated the Charging Party

On September 16, during the Managing Partner's interview with the Charging Party, he asked her, "How did it come about that [the associate] told you he spoke with the [the Supervising Partner]?" We agree with the Region that this question violated Section 8(a)(1) because it was directed at the Charging Party's communications with fellow employees regarding her protected complaint.

Accordingly, we conclude that the Region should proceed with the complaint it issued in this case and set the matter for hearing, absent settlement.

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it instructed the charging party not to discuss her sexual harassment claim. The employer in Schwab explained that confidentiality would prevent the accused harasser from prematurely learning of the claim and creating a hostile environment for the accuser or others; influencing potential witnesses from altering their recollection of the subject events; and ensuring the integrity of the investigation so that others would feel confident when reporting harassment. The ALJ concluded that that the no-communication rule was reasonable under the circumstances because, "the entire matter was resolved within a week of [the charging party's] request, and the investigation was concluded." JD(SF)-79-04, Case 28-CA-19445, slip op. at 19-20.

[30] See e.g., Holling Press, supra, 343 NLRB No. 45, slip op. at 3 (the Board emphasized that sexual harassment, "can be, and often is, of concern to many persons in the workplace"). See also Impala Bob's, Inc., JD(SF)-27-04, Cases 28-CA-18858, slip op. at 6 (April 9, 2004) ("...a safe work place free of sexual and physical harassment is certainly a most basic condition of employment").

B.J.K.